

An Overview of Conservation Easements: Questions & Answers

What is a "conservation easement"?

A conservation easement is a practical way for private landowners to protect environmentally significant land while retaining their ownership. Conservation easements are a positive and voluntary means that a landowner can employ to permanently protect their land for its ecological value, wildlife habitat, watershed quality, agriculture, silviculture, scenic enjoyment, historic or archaeological values, and/or public recreation. These are important public benefits that landowners can secure through their own private initiative.

A conservation easement is a legal restriction that a landowner places on his or her property to define and limit the type of development that may take place there. Generally conservation easements are donated to a non-profit conservation organization (such as The Pacific Forest Trust), or to a public agency, which then carries the responsibility to inspect the land periodically and enforce the restrictions in perpetuity.

How does a conservation easement affect my property rights?

Each easement is drafted individually, tailored to fit the natural characteristics of the land, the personal vision of the landowner for the property's future use, and the goals of the conservation organization. After a thorough review of the property's uses and natural characteristics, and discussions with the landowner, the terms of the easement are agreed upon. Then a legally enforceable agreement is drafted between the landowner (the "grantor") and the recipient organization (the "grantee") according to relevant state and federal laws. The easement becomes part of the title to the property and all future owners must accept the property subject to the easement's restrictions, even if the land is thereafter sold, transferred to heirs or subdivided.

To understand the easement concept, think of owning land as holding a bundle of property rights. A landowner may sell or give away the whole bundle, or just one or two of those rights. Commonly these may include, for instance, the right to mine or quarry, the timber harvest rights, or water rights. A conservation easement is based on this same principle of separating out one or more of various ownership rights and selling or giving those rights to a third party. The underlying property and all the retained property rights are unaffected. The property can be mortgaged, transferred or sold just as it normally would, whether it is encumbered by a third-party timber harvest agreement, a power-line right-of-way, or a conservation easement.

The specific rights that a property owner is restricting or retaining are spelled out in each easement document according to the agreement reached between the landowner and the recipient organization. Typically, with conservation easements certain development rights such as construction, subdivision, timber harvesting or mining, are restricted to some degree so as to limit impacts on the land that may harm the conservation values that have been identified for protection. The grantee organization, such as the

Pacific Forest Trust, receives these rights on the basis that they will ensure these rights are not exercised through time so as to preserve character of the land.

The land remains in private ownership and is still utilized in all the ways that have not been specifically restricted and are appropriate within the scope of the easement agreement: agriculture, silviculture, limited residential development, recreation, etc., all can continue and, indeed, may flourish freed from underlying speculative development pressures thanks to the conservation easement restrictions.

What uses are prohibited on land with a conservation easement? What uses are allowed?

Every easement is customized to the land and landowner, so they come in all sizes and shapes. Permitted and prohibited uses are jointly developed by the landowner and the easement grantee. Most easements prohibit industrial and mining uses of the land. In addition, most usually limit commercial development, residential densities and subdivision rights. Other possible prohibitions may include: changing the topography, such as dredging and filling wetlands or altering watercourses; removing topsoil and other surface or sub-surface materials; extensive road-building; disturbing certain wildlife habitat or particular species of plants or animals; clearcutting forested lands; and erecting signs or outdoor advertisements.

This is not to say that all development is prohibited: that is up to the landowner, the land trust and the requirements of the natural characteristics being protected. Some limited development for residential or commercial purposes may be provided for, usually to a lesser extent than zoning allows, while preserving important open space, habitat or scenic values. Resource protection easements, on agricultural and forestland, permit activities and structures necessary and compatible with the preservation and responsible use of the natural resources.

On the other hand, many landowners identify significant parts of their property as areas that will remain "forever wild," where no development or alterations are permitted. Certain natural communities, habitat or species are so special that complete and permanent protection is considered appropriate by the easement drafters.

Any uses not specifically prohibited in the easement are permitted, though permitted activities are usually required to be consistent with the conservation purposes of the easement. The landowner retains all ownership rights not expressly restricted by the easement, including the right to control access. Ownership and title to the property remains with the granting landowner.

The decisions relating to permitted, restricted and prohibited uses can be influenced by the landowner's interest in estate and income tax planning, family or business issues, and financial needs; as well as by the conservation purposes which guide the recipient organization's activities.

Is timber harvesting or other productive use still allowed with a conservation easement?

Certainly, as long as the significant ecological characteristics of the forest are preserved. As described above, the specific terms of the conservation easement are tailored to the land and the landowner's desired uses. The degree of timber harvesting permitted on forestlands depends on the ecological assessment of the property and is negotiated between the land trust and the grantor. Aspects to be considered include the site and species characteristics of the forest, including timber stocking and its overall ecological health; habitats identified for restoration or enhancement; areas of high biological diversity; rare species or natural

communities, including old growth stands; riparian and wetland areas; scenic qualities; erosion features and unstable areas; existing or planned road systems; and recreational or development opportunities. Certain silvicultural practices that are considered to have a negative impact on the forest ecosystem, such as clearcutting or cutting on very steep slopes or along streams, are typically prohibited. Many forms of productive use are acceptable as long as they do not harm the natural characteristics that the easement has been created to preserve.

Does granting a conservation easement give the general public the right to enter my property?

No -- not unless the landowner expressly grants that right in the easement document. Most easements do not allow public access. The landowner continues to decide as usual whether or not to allow individuals or groups on the land. Sometimes landowners choose to give the public the right to cross the property in a specific area. This right is particularly appropriate when part of the land has been used traditionally for public access to the ocean or river, for instance, or where an established or proposed trail system traverses the land.

If an easement is given for recreational or educational purposes, public access is required by the IRS if the landowner wishes to claim a tax deduction. For scenic easements the property must be visible to the public, but physical access is not necessary. For historic preservation easements, either visual or physical access is required, depending on the nature of the property or building to be preserved.

Who grants the easement, and to whom can they grant it?

Only the owner of a particular property with conservation or historic resources may grant an easement. If the property belongs to more than one person, all owners must consent to granting an easement. If a corporation owns the property, then its Board of Directors must approve the grant. If a property is mortgaged, the owner must obtain an agreement from the lender to subordinate its interests to those of the easement grantee so the easement cannot be extinguished in the event of foreclosure.

If an easement grantor wishes to claim tax benefits for the gift of an easement, he or she must donate it, or sell it for less than fair market value, to a public agency or to a land conservation organization qualified as a public charity under the IRS Code Section 501(c)(3). The Pacific Forest Trust is so qualified. A donated easement must provide for permanent or "perpetual" protection to be recognized by the IRS as a tax-deductible gift. The value of a donated easement is determined for tax purposes by a qualified appraisal.

What are the responsibilities of the grantee organization? How are easements enforced?

Holding an easement is a great responsibility. By giving an easement to a land trust or other qualified recipient, the grantee is authorized to enforce the specific terms of the easement on future use of the property. The grantee periodically monitors the property for compliance with the easement's restrictions and takes corrective action if its terms are violated. Enforcement can include legal action and restoration of the property. Procedures for correcting violations and rectifying damages are specified in the easement document itself. An easement does not give the grantee title to the property; title and all rights that are not inconsistent with the easement's conservation purposes are retained by the landowner.

A property owner should make sure that the recipient organization has the resources to monitor and enforce the terms of the easement through time on behalf of the grantor. This is why The Pacific Forest Trust, like all land trusts, has established the Forest Stewardship Fund to provide for the on-going costs of easement maintenance and enforcement.

Can an easement be modified or amended?

A conservation easement cannot be changed at the wish of the grantor or subsequent owner. At minimum, the consent of the grantee organization is required and a court proceeding may be necessary. Tax benefits that may have accrued to the grantor must also be considered. In practice, a conservation easement is unlikely to be modified unless the change would strengthen the conservation value of the original easement.

What are the advantages of a conservation easement?

For the landowner, a conservation easement offers means to protect the special attributes of a property without the need to relinquish the ownership, all productive use and enjoyment of the land. In addition, the landowner gains the satisfaction of knowing that the land he or she values will be protected and preserved in perpetuity. Moreover, conservation easements meeting the standards of the Internal Revenue Code are deductible as charitable contributions.

Even easements not meeting the IRS standards may still provide tax benefits. For example, by reducing the size of a taxable estate a conservation easement may enable land to pass intact to future generations when it might otherwise have to be sold to pay estate taxes.

Conservation easements are an effective, private and low-cost means for the public to benefit from the protection of forestland for open space, wildlife habitat, ecological significance, responsible resource production and scenic enjoyment – all of which would be lost through unrestricted development. Conservation easements provide a means for individuals, families and businesses in rural communities to protect their natural resources and traditional land uses from depletion, urbanization, and wholesale development, while retaining private ownership.

Are there financial benefits to donating a conservation easement?

Income taxes: Donation of development rights and other conservation restrictions through an easement may constitute a charitable gift deductible for federal and state income tax purposes. The value of the gift, determined through a qualified appraisal, is equal to the difference between the fair market value of the property before the easement is granted and its after-easement value. To be deductible, an easement must be permanent, meet certain conservation and public benefit tests established by the IRS, and be donated to a "qualified" organization, like The Pacific Forest Trust.

Generally, the Internal Revenue Code Section 170(h) defines the necessary "conservation purposes" of an easement to include at least one of the following:

- the preservation of land areas for outdoor recreation by, or the education of, the general public; or
- the protection of relatively natural habitats of fish, wildlife, or plants, or similar ecosystems; or
- the preservation of open space -- including forestland and farmland-- for scenic enjoyment or pursuant to an adopted governmental conservation policy; in either case such open space preservation must yield a significant public benefit; or
- the preservation of historically important land areas or buildings.

Estate taxes: State and federal estate taxes on unrestricted land can be so high that the heirs are often forced to sell some or all of the land just to pay the taxes. With the rapid appreciation of land values in the Pacific region, many landowning families don't recognize how devastating the estate tax bill can be with the full market value of their land factored in. The real effect of federal estate tax rates ranges from 37% for estates valued over \$600,000 to 55% for estates over \$3 million. (With the passage of the Taxpayer Relief Act of 1997, the unified tax credit will gradually rise up to \$1 million by 2007.) An easement can reduce the appraisal value of property significantly, often to the extent that estate taxes are reduced or eliminated. Thus, an easement may enable heirs to keep land that they otherwise would have to sell.

Gift taxes: When a person gives land to someone who is not his or her spouse, the gift is subject to federal gift taxes if its value exceeds the maximum tax-free amount of \$10,000 given to any one person per year. Lowering the appraised value of the land through a qualified easement may allow the owner to give more land in any one year without incurring a gift tax, or it may help reduce the amount of tax imposed.

(Examples of possible landowner income and estate tax savings are available from The Pacific Forest Trust. There are a number of other provisions of the Taxpayer Relief Act likely to be of interest to a forest landowner. Potential easement donors should consult with their own legal counsel and accountant in determining their potential for income and estate tax benefits, and how a conservation easement can be compatible with other tax planning tools.)

Property taxes: The reduced value and restricted uses of land subject to easements has formed the basis for reduced property tax assessment in many states. If a landowner's property is not presently in a special tax program for timber or agricultural production, and the easement significantly reduces the appraised value of his or her land, then the landowner should consider contacting the County Assessor for a reduced valuation.

What are the disadvantages of a conservation easement?

A conservation easement is not appropriate in every case. Some parcels of land are not sufficiently valuable from a conservation standpoint to justify the restrictions of an easement. In other cases, the conservation values may be so significant and fragile that outright fee ownership of the property is the best means of protection. The Pacific Forest Trust has developed a set of criteria for its Board to use in assessing the relative merits of proposed easements. Interested landowners should request a copy of these guidelines.

A potential disadvantage for the landowner is that a conservation easement, in restricting the use of the land, may reduce the land's market value. A landowner concerned about the financial implications of a conservation easement should carefully weigh the trade-off between possibly reduced market value and any potential tax advantages.

For the conservation organization, an easement means the responsibility and expense of regularly monitoring the property and, if necessary, enforcing the easement in court. A conservation organization like The Pacific Forest Trust will accept an easement only if it meets the organization's objectives and only if the PFT is able to fulfill the responsibilities involved.

What if I have more questions?

Please contact the main office of The Pacific Forest Trust at 416 Aviation Blvd., Ste. A, Santa Rosa, CA 95403, or call 707-578-9950 for additional assistance with your particular property and land conservation objectives. Our Oregon-Washington Field Office is located at 157 Yesler Way, Seattle, WA 98104; 206-292-4747. **The Pacific Forest Trust is a private, nonprofit corporation devoted to the voluntary protection of privately owned productive forestland in the Pacific forest region, including northern California, Oregon and Washington.**